Case No. 91-1634

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF FLORIDA,

Petitioner,

vs.

JEROME JONES,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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TENTH JUDICIAL CIRCUIT OF FLORIDA
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QUESTION PRESENTED

IS AN INDIVIDUAL'S FLIGHT FROM IDENTIFIABLE LAW ENFORCEMENT OFFICERS SUFFICIENTLY SUSPICIOUS IN AND OF ITSELF TO JUSTIFY A TEMPORARY INVESTIGATIVE STOP PURSUANT TO TERRY V. OHIO, INFRA., AND CALIFORNIA V. HODARI D., INFRA.

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JURISDICTION OF THE SUPREME COURT

Respondent accedes this Court has jurisdiction to hear this case.

STATEMENT OF THE CASE

For the limited purpose of this Court considering the issues raised in the Petition for Writ of Certiorari by Petitioner State of Florida, the Statement of the Case in that Petition may be accepted with the following exceptions:

On January 28, 1992, the Court of Appeals for the Second District of Florida issued its mandate. The Assistant State Attorney filed a notice of nolle prosequi on February 18, 1992, stating that as the evidence was suppressed there was insufficient evidence to prosecute.

REASONS FOR DENYING THE WRIT

THE TRIAL COURT DID NOT ERR IN FINDING THE RESPONDENT'S FLIGHT FROM POLICE OFFICERS DID NOT GIVE THE OFFICERS REASONABLE SUSPICION TO DETAIN THE RESPONDENT.

The Florida Second District Court of Appeals gave no reason for affirming the trial court's granting of Respondent's motion to suppress. The general rule in Florida is the trial court's decision will be affirmed, even if the decision is based on erroneous reasoning, when the evidence or another theory supports it. Caso v. State, 524 So.2d 422 (Fla. 1988), cert. den. 488 U.S. 870, 109 S.Ct. 178, 102 S.Ct 178 (1988), Belvin v. State, 585 So.2d 1103 (Fla. 2d DCA 1991). This Court has ruled that, in the absence of exceptional circumstances, it would defer to state court factual findings, even when those findings relate to constitutional issues. The test would be whether the findings of the Polk County trial court were clearly erroneous if at all. Hernandez v. New York, 500 U.S.__, 111 S.Ct.__, 114 L.Ed.2d 395 (1991).

Florida courts have held that flight from an approaching officer, even in a high-crime area, without more, does not give rise to a founded suspicion and does not justify a stop and frisk. Gipson v. State, 537 So.2d 1080 (Fla. 1st DCA 1989); Johnson v. State, 547 So.2d 699 (Fla. 1st DCA 1989); Daniels v. State, 543 So.2d 363 (Fla. 1st DCA); Hill v. State, 561 So.2d 23 (Fla. 3d DCA 1990); Curry v. State, 570 So.2d 1071 (Fla. 5th DCA 1990). The trial court found the stop of Respondent at a train station was a police citizen encounter. As the Respondent was free to leave at

any time, the Respondent's decision to exercise that right should not have been used to give the officers a reasonable suspicion to then stop the Respondent. Further a person has a right under Florida law to flee from an officer who is attempting to make an illegal arrest. Under section 843.02, Florida Statutes (1991), an officer must be engaged in the lawful execution of his lawful duty to arrest a person for resisting arrest without violence (fleeing). The Petitioner has stipulated this is a consensual encounter, and the officers did not have an well-founded suspicion of criminal activity to stop the Respondent. If an officer has no suspicion a person has committed, was committing, or was about to commit a felony or misdemeanor, the person would not be guilty of resisting arrest without violence or fleeing an officer. F.E.C. v. State, 559 So.2d 413 (Fla. 2d DCA 1990).

Respondent would argue the findings of the trial court are not clearly erroneous. As this was a consensual encounter, the Respondent did not have to talk to the police, and could have left at any time. If this only was a consensual encounter, Respondent had a right to refuse to talk to the officers and leave. The Petitioner is seeking to penalize the Respondent for exercising his right to leave. Respondent had 3 choices: (1) he could have consented to the search of his person, (2) he could have stayed and refused consent, or (3) he could have left the scene. Respondent contends choices 2 and 3 are the same but are just different means of refusing consent. The State of Florida argues that guilt can be assumed from flight. If a guilty mind can be inferred from flight

from police officers, can the same guilt be inferred from refusing to consent to a search? The State of Florida's reasoning would say yes, but it would allow a Terry stop whether a defendant left or stayed without a founded suspicion during a consensual encounter.

The Petitioner argues an individual's flight from an identifiable law enforcement officer in and of itself justifies a temporary investigative stop. Petitioner believes this is a logical extension of the Court's decision in California v. Hodari D., 499 U.S. __, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). In the case of Hodari D., supra, police officers chased juveniles who fled on their approach. The limited holding of this court was that Hodari D. was not seized (touched) so the drugs dropped by Hodari D. were not the fruits of a seizure. The issue was the seizure of the dropped drugs and not the seizure of the person. The court did not address the point whether it would be unreasonable for the police to stop young men who scatter on the mere sighting of police. The facts in Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1986) are somewhat similar as the drugs dropped by the defendant, while being chased by police, were held improperly suppressed as there was no "seizure" of the defendant. The court in Chesternut expressly declined to hold the act of fleeing constituted a reasonable suspicion to justify a seizure.

Petitioner cites several cases involving flight from law enforcement officers. No case, with only one exception, directly holds flight in and of itself gives an officer a right to make an investigative stop on a person. In United States v. Pope, 561 F.2d

663 (6th Cir. 1977), the defendant was being chased by DEA agents when he threw a white bag in a sewer and swung a briefcase at one of the agents. The case is more akin to Hodari D. and Chesternut.

In United States v. Haye, 825 F.2d 32 (4th Cir. 1987), the court held the defendant's meeting some type of drug courier profile **combined with** his flight gave police reasonable, articulable suspicion, based upon articulable facts to make a Terry stop. In United States v. Cardona-Rivera, 904 F.2d 1149 (7th Cir. 1990), the Appellant had been seen in a conversation with a drug dealer and had delivered a shopping bag to the same address. The Appellant fled when the officers approached to question him on the above facts. The court held the officers had an articulable suspicion of criminal activity when they approached the Appellant unlike this case.

In Commonwealth v. Sanchez, 531 N.E.2d 1256 (Mass. 1988), the court held when a defendant flees after consenting to a search, the officers are justified in subjecting the him to a initial investigatory inquiry. Respondent did consent to the search of his baggage, but did not consent to the search of his person. As the stop was a consensual encounter, the Appellant was free to leave. In State v. Anderson, 454 N.W.2d 763 (Wis. 1990), the trial court found the defendant, who was known to the police, had attempted to evade the officers. The court held the "situation 'called for investigation' and that the officers handling of the situation was 'appropriate police work.'" The court held, "that behavior which evinces in the mind if a reasonable police officer an intent to

flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by police." Anderson, 454 N.W. 2d at 768. The police had received complaints that Anderson was parking in private business stalls. The officer testified he stopped Anderson's vehicle because of the parking situation and the suspicious behavior of Anderson's driving. The Wisconsin Supreme Court in the above decision concluded Anderson's driving constituted flight although the trial court never made such a specific finding. Anderson, at 765. The Anderson case did not involve a consensual encounter.

CONCLUSION

The Florida Court of Appeals correctly deferred to the fact finding of the trial court which granted the motion to suppress. Under Florida law the Respondent had a right to leave; and that right to leave should not be used for a basis to stop the Respondent. As the findings of the trial court are not clearly erroneous, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Assistant Public Defender

Member of the Bar of the
United States Supreme Court

TIMOTHY J. FERRERI
Assistant Public Defender

TJF/lw

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STATE OF FLORIDA, Respondent.

CERTIFICATE OF SERVICE

I, DEBORAH K. BRUECKHEIMER, a member of the Bar of this Court, hereby certify that on this 16th day of June, 1992, one copy of the Petition for Writ of Certiorari, one copy of the Motion for Leave to Proceed In Forma Pauperis were mailed to Michael A. Neimand, Assistant Attorney General, Suite 700, 2002 North Lois Avenue, Tampa, FL 33607, counsel for respondent. I further certify that all parties required to be served have been served.

Deborah K. Brueckheimer

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